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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. [redacted]

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

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OCTOBER TERM, 1969

No. _____,

THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, Theon Jackson, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-captioned case on February 19, 1970, petition for rehearing thereafter denied on May 14, 1970.

OPINION BELOW

The trial court, The Marion Criminal Court, Division I, entered a judgment on December 26, 1968, printed herein at p. 1a

as Appendix A. The Supreme Court of Indiana rendered judgment affirming the trial court and entered an opinion on February 19, 1970, which is printed herein at 2a as Appendix B and is reported at 255 N.E. 2d 515, with dissenting opinion printed herein at p. 7a and is reported at 255 N.E. 2d 518.

Upon Petition for Rehearing duly filed the Supreme Court of Indiana entered an order denying the same as follows, without further opinion, to-wit:

> "Appellant's Petition for rehearing Denied. Jackson and DeBruler, JJ. Dissent."

on May 14, 1970.

JURISDICTION

The Supreme Court of Indiana entered its opinion affirm ng the Judgment of the trial court on February 19, 1970. A timely Petition For Rehearing was thereafter duly filed by Petitioner Theon Jackson on March 11, 1970, which petition for rehearing was

denied by the Supreme Court of Indiana, without opinion, on May 14, 1970. This Petition For Certiorari is filed within ninety (90) days of that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The federal questions raised in this appeal are:

1. Whether the Indiana Courts violated the dictates of the Eighth Amendment of the Constitution of the United States by ordering the confinement of the Petitioner, a feebleminded deaf mute, until he has "become sane" as a commitment under a criminal charge (two charges, with joint sanity hearing) as distinguished from a civil commitment, such confinement amounting to a life sentence resulting from the lodging of the criminal charge, without trial thereof, constituing cruel and unusual punishment.

2. Whether the Indiana Courts violated the dictates of the Fourteenth Amendment of the Constitution of the United States by applying a statute concerning the insane, ordering the confinement of the Petitioner, a feebleminded deaf mute, until he has "become sane", confining him for life solely because he has been charged with a crime(s) for which he has not and will not be tried, (and as to which charges there have not even been any judicial determinations made that the incidents occurred, in respect to probable cause), and which he was incapable of committing, as crimes.

CONSTITUTIONAL PROVISIONS INVOLVED

Eighth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

EIGHTH AMENDMENT:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also Article 1, Section 12, of the Constitution of the State of Indiana:

"All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

STATUTES INVOLVED

The judgment of the Indiana trial court, affirmed by the Supreme Court of Indiana, was based upon the following Indiana statute:

Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann., 1956 Repl., (1969 Supp.), Sec. 9-1706a:

"When at any time before the trial of any criminal cause ***the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and

shall appoint two (2) competent disinterested physicians wh shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

The applicable statutes for the commitment and discharge of feebleminded persons are as follows:

Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907:

"A reputable citizen of the county from which an application is to be made shall make an application *** setting forth information substantially as follows: ***the cause and duration of the feeble-minded condition *** together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees, that he or she is feeble-minded and is not insane ***."

Acts of the General Assembly of Indiana, 1919, Ch. 94, Sec. 18, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1814:

"Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

STATEMENT OF THE CASE

The Petitioner was charged in Indianapolis, Marion County, Indiana, with the criminal offense of robbery, in two (2) separate causes, by affidavits. The first charge, filed May 5, 1968, (R. 1, ll. 1-12), charged the Petitioner with having committed a robbery on July 22, 1967, (R. 2), and the second affidavit, filed May 6, 1968, (R. 1, ll. 1-12), charged the Petitioner with having committed a robbery on July 28, 1967. (R. 2) In each case the Petitioner waived arraignment and entered a plea of "not guilty", (R. p. 12, both Transcripts, ll. 4-6); and on September 13, 1968, the counsel for Petitioner, stating that he had been unable to communicate with the Petitioner with respect to the question of jury waiver, requested that the causes be set on the Jury docket. (R. 24,25 both Transcripts) Thereafter on October 23, 1968, the court made an entry and order in both cases,

stating that: (R. 26, both Transcripts, ll. 5-9)

> "Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same."

In the joint report of the appointed doctors filed Nov. 12, 1968, observing that Petitioner does not hear and does not communicate except through sign language and some pantomime, they further stated that Petitioner

> "***is mentally defective and coupled with his severe hearing loss and comunication loss that he can neither understand the nature of the charge against him nor can he adequately participate in preparing his own defense."

(R. 28, ll. 1-5, 29, both Transcripts)

On December 18, 1968, the trial court held a hearing in respect to Petitioner, as defendant in both said cases, (R. 32, ll. 1-9, both Transcripts), and on December 26, 1968, found that:

> "***defendant lacks comprehension sufficient to make his defense"

and entered the following order:

(R. 33, ll. 7-19, both Transcripts)

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

At the hearing Dr. Dwight Schuster testified that the Petitioner is a deaf mute, mentally defective, could only understand a very limited number of deaf mute signs, does not understand the nature of the charges against him and cannot comprehend sufficiently to make his defense. (R.52-54) As to a "cure" of Petitioner's condition, it would consist of his learning the deaf mute sign language if he is capable of so doing, but the Doctor stated that he questioned how much abaility the Petitioner has, and then stated that therefore the prognosis appears rather dim--that he didn't think he (and a Mr. Olson, a deaf mute interpreter) ever got through to the Petitioner-- that Petitioner is insane if that means unable to comprehend the nature

of the charges and to assist his attorney in his defense -- that he, the Doctor, does not believe his, the Petitioner's, "sanity" could be restored after commitment to the State Department of Mental Health -- and that the mental defect of the Petitioner is what is sometimes referred to in the law as feeblemindedness, mental retardation, the mental level of the Petitioner being a pre-school level. (R. 55-58)

The other appointed Doctor, Dr. Louis W. Nie, testified that even if the Petitioner were not a deaf mute, he would still lack the necessary comprehension, and that he, the Doctor, doubted that the basic intelligence of the Petitioner, even if he could develop communication, would enable him to communicate effectively and to participate in a knowing, understandable way in his defense. (R. 62,63)

The interpreter who worked with the Doctors, John Olson, a supervising teacher of the High School Department of the School

For The Deaf(Indiana), testified that the level of mental comprehension of the Petitioner is about a three (3) or four (4) year old deaf child -- that there isn't anything in the State of Indiana in the nature of facilities which could, after a length of time, aid the Petitioner to understand the nature of the charges and assist in the defense.

The counsel for Petitioner duly filed a motion for new trial in both cases, contending therein that the decision of the court is not sustained by sufficient evidence and is contrary to law, and pointing out that there was no evidence that the Petitioner was insane, that the evidence shows and establishes that his "sanity" cannot be restored, that he must, therefore, be considered as having been committed for the rest of his life, without conviction of any crime, in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States. (R. 34-37,

both Transcripts). Following the overruling of the motion for new trial, (R. 43, ll. 13-15, both Transcripts), the transcript of the Record and assignment of errors was duly filed with the Clerk of the Supreme Court of Indiana, in which assignment of errors Petitioner, by counsel, contended that the trial court had erred in overruling the motion for new trial. (R. 1A, both Transcripts)

In Petitioner's brief, the Appellant's Brief, his counsel duly contended, with appropriate citations, that without mental capacity there is no criminal intent, that without criminal intent there is no crime, that the Petitioner, being incapable of understanding the nature of the charges brought against him and unable to "recover" his "sanity" has been sentenced to life imprisonment, in violation of Article 1, Section 12 of the Constitution of Indiana, and the Eighth and Fourteenth Amendments of the Constitution of the United States.

(Appellant's Brief, pp. 23-26)

The Supreme Court of Indiana, in its opinion set out hereinafter at p. 2a, Appendix B, held that the Petitioner had not been denied due process of law, did not mention Appellant's contention in respect to the Eighth Amendment of the Constitution of the United States, but did hold that as to the imprisonment for life, the legislature under its police power may provide for the safety, health, and general welfare, including the confinement, care and treatment of the mentally defective, retarded or insane.

The dissenting opinion of Justice DeBruler, set out hereinafter at p. 7a, points out that the Petitioner cannot be committed under the state statute in question because the purpose of the commitment, to provide for treatment and trial in the future, cannot be accomplished, that the confinement of Petitioner for life on the basis of the existence of criminal charges against him,

unproven, is in violation of the due process clause of the 14th Amendment to the United States Constitution, as well as the equal protection clause of that Amendment.

Petitioner duly reiterated the same contentions of violation of the Eighth and Fourteenth Amendments of the Constitution of the United States in his Petition For Rehearing duly filed following the decision of the Supreme Court of Indiana, which Petition For Rehearing was thereafter denied without opinion by the Supreme Court of Indiana.

ARGUMENT

I.

THE CONFINEMENT OF THE PETITIONER, A FEEBLEMINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, AS DISTINGUISHED FROM A CIVIL COMMITMENT, SUCH CONFINEMENT AMOUNTING TO A LIFE SENTENCE RESULTING FROM THE LODGING OF THE CRIMINAL CHARGES, WITHOUT TRIAL THEREOF, CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The uncontradicted evidence in the hearing held in the Marion Criminal Court, Division I, pursuant to the Acts of the General Assembly of Indiana, 1951, Ch. 238, Sec. 2, as amended, and as found in Burns Ind. Stat. Ann. 1956 Repl., (1969 Supp.), Sec. 9-1706a, set out hereinabove at pp. 5,6 of this Petition, showed that:

1. The Petitioner is mentally defective, and cannot understand the nature of the charges against him. (R. 53, ll. 1-13)

2. The Petitioner, in addition to mental defect, is a deaf mute. (R. 54, ll. 3-6)

3. The Petitioner does not have sufficient comprehension to understand the nature of the charges or to make his defense. (R., 54, ll. 21-23)

4. If you equate insanity with being unable to comprehend the nature of the charges and to assist his attorney in his defense, Petitioner's sanity could not be "restored." (R. 57, ll. 27 to p. 58,

5. The mental defect is what is referred to in the law as feebleminded-ness, (R. 58, ll. 21-24), mental retard-ation.

6. Even if **Petitioner** were not a deaf mute, he would still lack the necessary comprehension. (R. 63, ll. 1-5)

7. Petitioner's mental comprehension is about that of a three or four year old deaf child, (R. 75, l. 24 to p. 76, l. 2), below 60 I.Q. (R. 76, l. 19 to p. 77, l. 3)

If **Petitioner** were committed to the institution designed for treatment and care of the feebleminded, under a civil commit-ment pursuant to the provisions of the Acts of the General Assembly of Indiana, 1939, Ch. 119, Sec. 3, as found in Burns Ind. Stat. Ann., 1964 Repl., Sec. 22-1907, set out hereinabove at p. 7 of this Petition, it would be upon certification by a repu-table physician that he is <u>not</u> insane; and he would be eligible for discharge

merely upon the determination of the superintendant that "the mental and physical condition of the(Petitioner) justifies it."

Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl.), Sec. 22-1814 (set out hereinabove at p. 7 of this Petition.)

But obviously the commitment in this case, "until he shall become sane", is for life.

Without mental capacity there is no criminal intent, and without criminal intent there is no crime,

Fritz v. State of Indiana (1912), 178 Ind. 463, 466, 99 N.E. 727

and it is not just a vague and general differentiation between right and wrong that indicates criminal responsibility, but rather specific knowledge and comprehension of the nature and consequences of the act with which the defendant is charged.

Flowers v. State of Indiana (1956), 236 Ind. 151, 163, 161, 139 N.E. 2d 185

It is that comprehension that the Petitioner, having a mental age of three or four, with almost an entire lack of communication with the society in which he lived, lacked. Being incapable of committing a crime, not having been convicted of any crime, being unable to understand the nature of the charges brought against him, and being unable to "recover" his "sanity", he has been sentenced for life imprisonment. Under such circumstances it is respectfully submitted that life imprisonment is punishment, cruel and unusual, in violation of the Eighth Amendment of the Constitution of the United States, supra, p.4.

Weems v. United States (1910),
217 U.S. 349

Powell v. Texas (1968)
392 U.S. 514

Robinson v. California (1962)
370 U.S. 660

II.

THE CONFINEMENT OF THE PETITIONER, A FEEBLEMINDED DEAF MUTE, UNTIL HE HAS "BECOME SANE" AS A COMMITMENT UNDER TWO CRIMINAL CHARGES, CONFINING HIM FOR LIFE SOLELY BECAUSE HE HAS BEEN CHARGED WITH TWO CRIMES, FOR WHICH HE HAS NOT AND WILL NOT BE TRIED (AND AS TO WHICH CHARGES THERE HAVE NOT EVEN BEEN ANY JUDICIAL DETERMINATION MADE THAT THE INCIDENTS OCCURRED, IN RESPECT TO PROBABLE CAUSE), AND WHICH HE WAS INCAPABLE OF COMMITTING, AS CRIMES, IS A VIOLATION BY THE STATE OF INDIANA OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Without repeating herein the uncontradicted evidence in the mental hearing in the trial Court, supra, pp. 16,17, we respectfully request herein that the same be noted under this point also.

The Petitioner, a man with the mental comprehension equal to that of a three or four hear old child, who is also a deaf mute, has, because of the existence of two pending criminal charges against him, been committed to confinement for life. He does not have, and can not in the future

have comprehension sufficient sufficient to make his defense to the criminal charges of robbery lodged against him. He is not insane, unless all feebleminded persons with a mental level of a three or four year old child are insane. In addition to his admitted mental deficiency he is deaf and unable to speak. It does not seem possible in this day and age, but this man without communication and with the brain of a small child has been sentenced to life imprisonment. As pointed out above at p. 18, he is incapable of committing a criminal act, as such, and if the State of Indiana did indeed commit him for treatment and care as a feebleminded person (with certification that he is not insane), he would be eligible for discharge merely upon the determination of the superintendant that

"the mental and physical condition of the (Petitioner) justifies it."

> Acts of 1919, Ch. 94, Sec. 18, as found in Burns (1964 Repl), Sec. 22-1814 (set out hereinabove at p. 7 of this Petition.)

It is respectfully submitted that as a matter of due process of law, under the Fourteenth Amendment of the Constitution of the United States, when it was established without contradiction that the Petitioner lacked comprehension, was feebleminded, had the mental capacity of a three or four year old deaf child, and was obviously therefore not criminally responsible for his acts, the State of Indiana should have been required to dismiss the criminal charges against the Petitioner, and commence proceedings for his commitment as a feebleminded patient to the appropriate State institution. There was at no time a judicial determin-

ation of probable cause, but it is obvious that no supportable determination of probable cause could have been made, since the Petitioner was incapable of committing a crime. There was simply no basis for the continuation of criminal charges against the Petitioner, any more than such charges could have been maintained against a defendant found to be only four years old. The commitment of Petitioner for life is neither fair nor just, and he has been deprived of due process and due course of law, and denied justice, to which he is entitled without denial, speedily, and without delay.

Fourteenth Amendment of the Constitution of the United States

Article 1, Sec. 12, Constitution of the State of Indiana

As stated by Justice DeBruler, in his dissenting opinion: (Appendix B, p. 8a herein, 255 N.E. 2d 518, 519)

> "Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns Sec. 9-1706(a) supra, would obviously be ended. Thus, the existence of unproved criminal charges operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see U.S. v. Curry (1969), 410 F. 2 1372.
>
> ***
>
> There is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. Buxstrom v. Herold (1966), 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620; U.S. ex rel. Schuster v. Herold (1969), 410 F. 2d 1071."

CONCLUSION

The Petitioner, by his undersigned counsel, respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana, and that the same should be held to be in violation of the Eighth and the Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY OF THE MARION CRIMINAL COURT, DIVISION I, STATE OF INDIANA, DEC. 26, 1968

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION CRIMINAL COURT, DIV. I
CAUSE Nos. CR68-0661
CR68-0663

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

APPENDIX B

OPINION OF THE SUPREME COURT OF INDIANA,
FEBRUARY 19, 1970

IN THE
SUPREME COURT OF INDIANA

Nos. 569 S 110
569 S 111

THEON JACKSON, Appellant, -vs- STATE OF INDIANA, Appellee.	Appeal from the Marion Criminal Court, Div. I Hon. John T. Davis, Judge

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ARTERBURN, J.

Appellant was charged by affidavits with two counts of robbery. There was no trial on either charge of robbery. The only issue considered by the trial court was the mental capacity of the appellant to stand trial. A hearing on the issue resulted in the following order by the trial court:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane."

The evidence at the hearing, which was conducted to determine appellant's capacity to stand trial, consisted mostly of the testimony of two psychiatrists the trial court had appointed to examine the appellant. Their examination revealed that appellant was a deaf-mute with a moderately severe intellectual defect. Both psychiatrists were of the opinion that appellant could neither understand the nature of the charges against him nor adequately participate in preparing his own defense. Appellant was found to be illiterate, which, when combined with his deaf-mute condition, presented a major communication gap. Appellant's mental retardation, or feeblemindedness, as one of the experts termed it, was such that his ability to learn sign language, or to learn to read or write, or both, was doubtful. Further testimony revealed that if appellant were to gain sufficient comprehension to stand trial it would be only as a result of developing a means of communication. But even then there was some doubt expressed as to whether appellant would be able to comprehend the charges.

The trial court, in ordering appellant's examination and confinement, acted pursuant to Burns' Ind. Stat. Ann. § 9-1706a (1969 Cum. Supp.) which reads as follows:

"Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged

insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. *If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution.* Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity. [Acts 1951, ch. 238, § 2, p. 682, 1961, ch. 151, § 2, p. 329; 1963, ch. 91, § 1, p. 58; 1967, ch. 291, § 2, p. 946.] (Emphasis added.)

It is appellant's contention that the above quoted statute is inapplicable; that he was denied due process of law; that in view of the unlikelihood of his improvement, he was in effect given a "life sentence." Appellant further urges that his commitment should properly be to an institute for the feebleminded and not to an institute for the insane. In this regard appellant would have the appellee first dismiss all charges against the appellant and then make application for appellant's commitment to an institution for the feebleminded. Appellant makes specific reference to Muscatatuck State Hospital and Training Center which was established to provide care for the feebleminded. Burns' Ind. Stat. Ann. § 22-1801 et seq. It appears to us that appellant has failed to understand the statutory mechanisms set up by the legislature as they refer to the Department of Mental Health.

Burns' § 9-1706a, which we quoted above, requires the appellant be committed to "the department of mental health, to be confined by the department in an appropriate psychiatric institution." It is clear that it is the department's function to determine the appropriate facility for the appellant. The choice does not lie with the appellant. Thus, the appellant is to be confined in "an appropriate psychiatric institution." Appellant

apparently equates the term "psychiatric institution" with the term "insane" and argues that appellant should not be committed to an institution for the insane. The statute is broader in scope than appellant would have us believe. First, an amendment made to § 9-1706a in 1967 is noteworthy. That amendment replaced the phrase "insane hospital" with the present "psychiatric hospital." That amendment also gave the department more flexibility in dealing with various mental problems by substituting the phrase "the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution" for the phrase "the court shall commit the defendant, whether male or female, to the division of maximum security of the Dr. Norman M. Beatty Memorial Hospital." These changes clearly indicate a broadening of the scope of § 9-1706a to meet such problems as the one herein presented by the appellant's condition. Further, a careful scrutinization of the statutes creating the Department of Mental Health and setting up the mechanism for its functioning clearly dispel appellant's narrow interpretation.

Burns' Ind. Stat. Ann. § 22-5009 (1969 Cum. Supp.) designates the institutions over which the commissioner of the Department of Mental Health is to have control. That statute reads in pertinent part as follows:

> "The commissioner of mental health shall have administrative control of and responsibility for all the state-owned and operated *mental health institutions*, including, but not necessarily limited to, the following designated institutions:
>
> (1) Central State Hospital;
>
> (2) Fort Wayne State Hospital and Training Center;
>
> (3) Evansville State Hospital;
>
> (4) New Castle State Hospital;
>
> (5) Richmond State Hospital;
>
> (6) Larue D. Carter Memorial Hospital;
>
> (7) Logansport State Hospital;
>
> (8) *Muscatatuck State Hospital and Training Center;*
>
> (9) Madison State Hospital;

(10) Dr. Norman M. Beatty Memorial Hospital; and

(11) Northern Indiana Children's Hospital.
(Emphasis added.)

It is clear from the above statute that Muscatatuck State Hospital and Training Center is a "mental health institution" and is within the control of the department of mental health. Burns' § 22-5003(9) defines a "mental health institution" as any state owned and operated "psychiatric institution" under the control of the department of mental health. Thus, Muscatatuck State Hospital and Training Center is "an appropriate psychiatric institution" within the meaning of the statute (§ 9-1706a), pursuant to which appellant was committed.

From the foregoing it can be seen that the Department of Mental Health, pursuant to § 9-1706a, is to commit appellant to an appropriate institution; that the available scope of institutions, as set out in Burns' § 22-5009, includes the Muscatatuck State Hospital, the very institute to which appellant aspires; and that the decision concerning the appropriate institution for the appellant is properly to be made by the department. There is nothing to prevent the Department of Mental Health from eventually committing appellant to the institution he now desires. The choice lies within the professional and expert opinion of the department. It is not for appellant to dictate.

Appellant's argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.

Morgan v. State (1913), 179 Ind. 300, 101 N.E. 6; *Marx v. State* (1957), 236 Ind. 455, 141 N.E.2d 126; *State ex rel. Mavity v. Tyndall* (1946), 224 Ind. 364, 74 N.E.2d 914, cert. denied, 333 U.S. 834, 68 S.Ct. 609, 92 L.Ed. 1118, rehearing denied, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138.

Judgment affirmed.

Hunter, C.J., and Givan, J., concur.

Jackson, J., concurs in result.

DeBruler, J., dissents with opinion.

DISSENTING OPINION

DEBRULER, J.

The appellant was charged by affidavit with two robberies, totalling $9.00. Appellant is a twenty-seven year old deaf-mute, blind in one eye, who has never been to any school and has only a rudimentary understanding of sign language. He can neither read nor write.

Two psychiatrists and a teacher from the State School for the Deaf interviewed appellant and testified at the hearing on his competence to stand trial. They all agreed that appellant could not comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication other than a few gestures and pantomimes. They also agreed that there was almost no chance that appellant ever could improve his understanding sufficiently to be tried, even if he could gain a means of communication. However, the interpreter from the School for the Deaf stated that he knew of no facilities in this State which could help this appellant. He also stated the School for the Deaf did not accept mentally retarded persons. Thus, in effect, the commitment of appellant until he can comprehend the nature of the charges against him and assist in his defense is a commitment for life.

Burns' Ind. Stat. Ann. § 9-1706(a) provides for the commitment to the Department of Mental Health of a criminal defendant who is incompetent to stand trial because he "has not comprehension to understand the proceedings and make his defense." This commitment is for the purpose of giving the psychiatrists a chance to determine what can be done to alleviate the defendant's mental condition so that he can be tried, and a reasonable opportunity to achieve that goal. When the defendant's "sanity" is restored the commitment comes to an end because the purpose of the commitment has been accomplished.

That this is the rationale of the statute can be seen from the statutory language which says:

> "If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, *the trial shall not be delayed or continued* on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, *the trial shall be delayed or continued* on the ground

of the alleged insanity of the defendant. . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same *as if no delay or postponement* had occurred by reason of defendant's insanity." Acts 1951, ch. 238, § 2, as last amended by Acts 1967, ch. 291, § 2, Burns' § 9-1706(a). (Emphasis added.)

The statute clearly contemplates a *delay* in the trial or a *postponement*, which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the *purpose* of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent. Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that appellant "has not comprehension to understand the proceedings and make his defense" in my opinion would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable basis is there for committing this appellant to a psychiatric institution for, what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns' § 9-1706(a), *supra*, would obviously be ended. Thus, the existence of *unproved criminal charges* operates to keep appellant confined in a state institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see *U.S. v. Curry* (1969), 410 F.2d 1372.

A permanent or open ended commitment under Burns' § 9-1706(a) would also violate the equal protection clause of the 14th Amendment to the United States Constitution. In order

to civilly commit a mentally deficient person the court would have to find that the person, because of a "psychiatric disorder," which includes mental deficiency, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such persons reside. Burns' § 22-1201(1) and (2). There has never been such a finding in this case and there is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Baxstrom v. Herold* (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; *U.S. ex rel. Schuster v. Herold* (1969), 410 F.2d 1071.

The majority opinion, in effect, holds that this technique is within the State's police power to provide for the safety, health and general welfare. I strongly dissent. The majority opinion's summary disposition of this important federal question is not a correct resolution of this issue.